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13 PRODUCTS INC.; LENNOX INTERNATIONAL INC.;
14 SUPERIOR FIREPLACE COMPANY

15 UNITED STATES DISTRICT COURT
16
17 NORTHERN DISTRICT OF CALIFORNIA

18 KIRK KEILHOLTZ and KOLLEEN
19 KEILHOLTZ for themselves and on behalf
20 of those similarly situated,

21 Plaintiffs,

22 v.

23 SUPERIOR FIREPLACE COMPANY;
24 LENNOX HEARTH PRODUCTS INC.;
25 LENNOX INTERNATIONAL INC. and
26 DOES 1 through 25, Inclusive,

27 Defendants.

CASE NO. 3:08-cv-00836-SI

**DEFENDANT LENNOX
INTERNATIONAL INC.'S:**

**(1) NOTICE OF MOTION AND MOTION
TO DISMISS FOR LACK OF PERSONAL
JURISDICTION; AND**

**(2) MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS FOR LACK OF
PERSONAL JURISDICTION.**

[Fed. R. Civ. Proc. 12(b)(2)]

[Declaration of Kenneth C. Fernandez filed
concurrently herewith.]

Date: August 11, 2008
Time: 9:00 a.m.
Courtroom: 10
Judge: Susan Illston

Complaint Filed February 6, 2008

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NOTICE OF MOTION

PLEASE TAKE NOTICE THAT, on August 11, 2008, at 9:00 a.m., or as soon thereafter as the matter may be heard at the United States District Court for the Northern District of California, Courtroom 10, with the Honorable Susan Illston, located at 450 Golden Gate Ave., San Francisco, California, Defendant Lennox International Inc. (“Lennox International”) will and hereby does specially appear to move, pursuant to Federal Rule of Civil Procedure 12(b)(2), for an order from the Court dismissing Lennox International from this matter for lack of personal jurisdiction.

This motion is made pursuant to Federal Rule of Civil Procedure 12(b)(2) on the grounds that the Court lacks personal jurisdiction over Lennox International. Lennox International does not have substantial, continuous and systematic contacts with California, and the Court therefore cannot exercise general personal jurisdiction over Lennox International. Additionally, Lennox International has not purposefully availed itself of forum benefits; Lennox International has no limited contacts with the forum; and the assertion of personal jurisdiction in this case would not comport with fair play and substantial justice. Accordingly, the Court cannot exercise specific personal jurisdiction over Lennox International.

Lennox International’s motion is based on this Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities; the concurrently filed Declaration of Kenneth C. Fernandez; all of the pleadings and records on file in this action; and any other oral and documentary evidence which the Court receives at the hearing on this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Lennox International Inc. (“Lennox International”) hereby moves to dismiss the Individual and Class Action Complaint for Equitable Relief, Restitution and Damages (“Complaint”) filed by Plaintiffs Kirk Keilholtz and Kolleen Keilholtz (collectively “Plaintiffs”).

I. INTRODUCTION

It is difficult to imagine claims more overreaching than those premised on an alleged failure to warn of the obvious risk of injury from touching the glass front of a burning fireplace. Nevertheless, Plaintiffs have outdone themselves, by asserting these claims against not only the

1 corporate entities that manufactured the fireplaces, but also a holding company that has no
2 connection with the fireplaces in issue or the State of California.

3 The fireplaces at issue are manufactured by Defendant Lennox Hearth Products Inc.
4 (“Lennox Hearth”). Contrary to the conclusory allegations set forth in the Complaint, Defendant
5 Lennox International does not have, and has never had, any involvement with the fireplaces at
6 issue. Lennox International does not design, engineer, test, assemble, manufacture, distribute,
7 supply, market, advertise, sell, maintain, or place any products on the market in California or any
8 other state. Rather, Lennox International operates solely as a holding company for numerous
9 subsidiaries. It performs no operations and conducts no business other than that of a holding
10 company. It exercises no control and has no involvement in the day-to-day operations of its past
11 or present subsidiaries, including Defendants Superior Fireplace Company and Lennox Hearth.
12 Accordingly, Lennox Intentional should be dismissed from this lawsuit because this Court does
13 not have personal jurisdiction.

14 II. STATEMENT OF FACTS

15 A. Plaintiffs’ Allegations Against Lennox International

16 Plaintiffs purport to represent a national class of “consumers” who own homes and other
17 residential dwellings in which one or more Superior and Lennox brand single pane sealed glass
18 front fireplaces (hereinafter “fireplaces”) have been installed within ten (10) years prior to the
19 date of the filing of the Complaint. (Compl. ¶ 2-3, 7-8.) Plaintiffs, on behalf of the putative class
20 members, assert claims for (1) violation of the California Business and Professions Code section
21 17200, otherwise known as the unfair completion law , (2) for violation of the Consumer Legal
22 Remedies Act, and (3) for unjust enrichment. (*Id.* ¶¶ 20-42.)

23 As the basis for these three claims, Plaintiffs allege that Defendants “concealed,
24 suppressed, omitted and misrepresented” certain “risks, dangers, defects, and disadvantages”
25 associated with the fireplaces. (*Id.* ¶ 1.) With respect to the alleged omissions, Plaintiffs assert
26 Defendants “failed to disclose” that the glass-front of the fireplaces become hot during operation
27 and that contact with the glass-front can result in a burn to the skin. (*Id.* ¶ 15.) With respect to
28 the alleged misrepresentations, Plaintiffs appear to assert that Defendants “represented to

1 consumers that [the] fireplaces were safe, of merchantable quality, and fit for their intended and
 2 reasonably foreseeable uses, and with sufficient protections and warnings regarding potential
 3 dangers and hazards....” (*Id.* ¶ 14.) Finally, Plaintiffs allege that Defendants issued deceptive,
 4 untrue and/or misleading advertising about the fireplaces, however, they do not point to any
 5 specific advertising that they believe fits this description. (*See id.* ¶ 21-22.)

6 In boilerplate allegations, Plaintiffs assert that each of the Defendants were at all times
 7 “the agents, servants, controlling and actively participating parents, subsidiaries, affiliates,
 8 relations, or employees” of each other, acted “within the course and scope of said agency, service
 9 and relationship,” and acted “with the consent and knowledge of, or in consort with” each other
 10 with respect to the alleged actions on which Plaintiffs rely to support their case. (*Id.* ¶¶ 12-13.)

11 **B. Lennox International Is A Separate Corporation From The Other Defendants, And**
 12 **Lennox International Was Not Involved In Any Respect With The Fireplaces At**
 13 **Issue**

14 Lennox International is a corporation duly organized under Delaware law with its
 15 principal place of business in Richardson, Texas. (Fernandez Decl. ¶ 3.) Lennox International is
 16 not and has never been qualified to do business in the State of California, and does not conduct
 17 business in California. (*Id.*) Lennox International does not have any offices or any employees in
 18 California. (*Id.*) Lennox International does not ship any merchandise to California, have any
 19 contracts with suppliers or vendors in California, or do any advertising in California. (*Id.*) In
 20 fact, Lennox International does not design, engineer, test, assemble, manufacture, distribute,
 21 supply, market, advertise, sell, maintain, or place any products on the market in California or any
 22 other state. (*Id.*) Rather, Lennox International operates solely as a holding company for
 23 numerous subsidiaries. (*Id.*) It performs no operations and conducts no business other than that
 24 of a holding company. (*Id.*) The only control exercised by Lennox International over its
 25 subsidiaries is by the exercise of its shareholder rights which are primarily the rights to elect the
 26 boards of directors of the various subsidiaries. (*Id.*) Each subsidiary makes its own decisions
 27 with respect to how it will conduct its specific business. (*Id.*)

28 Lennox International serves as the holding company for Lennox Industries, Inc., which is
 a corporation duly organized under Iowa law. (*Id.* ¶ 4.) Lennox Industries, Inc. wholly owns

1 LHP Holdings, Inc., which is a corporation duly organized under Delaware law. (*Id.*) LHP
2 Holdings, Inc., in turn, is the holding company for Lennox Hearth, which is a corporation duly
3 organized under California law. (*Id.*) Lennox International and Lennox Hearth have been formed
4 as, and have always operated as, separate corporate entities. (*Id.* ¶ 5.)

5 In 1998, SFC Holdings, a wholly owned subsidiary of Hearth Products, Inc., purchased
6 Superior Fireplace Company. (*Id.* ¶ 7.) SFC Holdings thereafter changed its name to Superior
7 Fireplace Company. (*Id.*) Effective January 11, 2001, Superior Fireplace Company merged into
8 Marco Manufacturing, Inc. (*Id.* ¶ 8.) Also effective January 11, 2001, the newly merged Marco
9 Manufacturing, Inc. changed its name to Lennox Hearth Inc. (*Id.*)

10 Prior to the merger, Superior Fireplace Company made its own decisions with respect to
11 how it conducted its business and how it operated. (*Id.* ¶ 9.) Lennox International did not direct,
12 instruct, or in any way control any operations of Superior Fireplace Company. (*Id.*) Lennox
13 International did not conduct business on behalf of Superior Fireplace Company, nor did it cause
14 Superior Fireplace Company to conduct any business on behalf of Lennox International. (*Id.*)
15 Lennox International never granted authority to Superior Fireplace Company to act as Lennox
16 International's agent in the conduct of any business affairs, including any affairs relating to
17 Superior Fireplace Company's products. (*Id.*) Lennox International did not ever direct, instruct,
18 or in anyway control Superior Fireplace Company with respect to the design, engineering, testing,
19 assembling, manufacturing, distributing, supplying, marketing, advertising, selling, maintaining,
20 or placing on the market, of any of Superior Fireplace Company's products. (*Id.*)

21 Lennox Hearth likewise makes its own decisions with respect to how it conducts its
22 business and how it operates. (*Id.* ¶ 5.) Lennox International does not direct, instruct, or in any
23 way control any operations of Lennox Hearth. (*Id.*) Lennox International does not conduct
24 business on behalf of Lennox Hearth, nor does it cause Lennox Hearth to conduct any business on
25 behalf of Lennox International. (*Id.*) Lennox International has not granted authority to Lennox
26 Hearth to act as Lennox International's agent in the conduct of any business affairs, including any
27 affairs relating to Lennox Hearth's products. (*Id.*) Lennox International has not directed,
28 instructed, or in any way controlled Lennox Hearth with respect to the design, engineering,

1 testing, assembling, manufacturing, distributing, supplying, marketing, advertising, selling,
 2 maintaining, or placing on the market, of any of Lennox Hearth's products. (*Id.*) Specifically,
 3 Lennox International had no involvement in the design, engineering, testing, assembling,
 4 manufacturing, distributing, supplying, marketing, advertising, selling, maintaining, or placing on
 5 the market, of the fireplaces at issue in this case. (*Id.* ¶ 11.)

6 III. STATEMENT OF ISSUE ON MOTION TO DISMISS

7 Whether this Court has personal jurisdiction over Defendants Lennox International.

8 IV. LEGAL ANALYSIS

9 Plaintiffs cannot establish that this Court has personal jurisdiction over Lennox
 10 International. Plaintiffs bear the burden of establishing that this Court has personal jurisdiction
 11 over Lennox International. Rio Properties, Inc. v. Rio Int'l. Interlink, 284 F.3d 1007, 1019 (9th
 12 Cir. 2002); see also Vons Cos., Inc. v. Seabest Foods, Inc., 14 Cal.4th 434, 449 (1996) ("When a
 13 defendant moves to quash service of process on jurisdictional grounds, the plaintiff has the initial
 14 burden of demonstrating facts justifying the exercise of jurisdiction"). It is well established that a
 15 court may exercise jurisdiction over a party only when doing so meets the requirements of due
 16 process. Doe v. Unocal Corp., 248 F.3d 915, 922 (9th Cir. 2001) (citing Cubbage v. Merchant,
 17 744 F.2d 665, 667 (9th Cir. 1984)). "The court may consider evidence presented in affidavits to
 18 assist it in its determination." *Id.* (citing Data Disc, Inc. v. Systems Technology Assoc., Inc., 557
 19 F.2d 1280, 1285 (9th Cir.1977).)

20 To establish personal jurisdiction over Lennox International, Plaintiffs must satisfy a two-
 21 part test. First, Plaintiffs must satisfy the requirement of California's long-arm statute. Cal. Code
 22 Civ. Proc. § 410.10. Second, Plaintiffs must establish that this Court's exercise of jurisdiction
 23 over Lennox International comports with federal due process. Int'l Shoe Co. v. Washington, 326
 24 U.S. 310, 316 (1945). Under California's long-arm statute, a California court may exercise
 25 personal jurisdiction over a defendant to the extent permitted by the United States Constitution.
 26 Cal. Code Civ. Proc. § 410.10; Mattel, Inc. v. Greiner and Hausser GMBH, 354 F.3d 857, 863
 27 (9th Cir. 2003); Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1484 (9th Cir. 1993); Data
 28 Disc, Inc. v. Sys. Tech. Assocs., Inc., 557 F.2d 1280, 1286 (9th Cir. 1977); Sibley v. Super. Ct.,

16 Cal.3d 442, 445 (1976). Thus, the limitations upon personal jurisdiction in California courts are “coextensive with the outer limits of due process under the state and federal constitutions, as those limits have been defined by the United States Supreme Court.” Rep. Int’l Corp. v. Amco Eng’rs, Inc., 516 F.2d 161, 167 (9th Cir. 1975).

The Due Process Clause allows a court to exercise personal jurisdiction over a foreign defendant only where the defendant has sufficient “minimum contacts” with the forum state that maintenance of suit would not offend “traditional notions of fair play and substantial justice.” Int’l Shoe, 326 U.S. at 316; Sibley, 16 Cal.3d at 445. The Due Process Clause thus protects parties from unfairly being brought into a forum with which the party has had no meaningful contacts, ties or relations. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985) (citing Int’l Shoe, 326 U.S. at 319). The goal of fairness requires there to be a substantial connection between the forum contacts and the plaintiff’s claim to warrant the exercise of jurisdiction. Cornelison v. Chaney, 16 Cal. 3d 143, 149 (1976).

Courts have identified two ways to establish personal jurisdiction: general or specific. See generally Int’l Shoe Co., 326 U.S. at 317; World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Plaintiffs cannot establish that this Court has either general or specific personal jurisdiction over Lennox International.

A. Plaintiffs Cannot Establish That The Court Has General Jurisdiction Over Lennox International

General personal jurisdiction exists only if a defendant has pervasive substantial “continuous and systematic” contacts with the forum such that it could reasonably anticipate being haled into court in the forum state based on an exercise of general jurisdiction. Int’l Shoe Co., 326 U.S. at 317; World-Wide Volkswagen, 444 U.S. at 297. The exercise of jurisdiction must also be reasonable. Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc., 1 F.3d 848, 851 (9th Cir. 1993).

“If the defendant’s activities in the forum are substantial, continuous and systematic, general jurisdiction is available; in other words, the foreign defendant is subject to suit even on matters unrelated to his or her contacts to the forum.” Doe, 248 F.3d at 923 (citing Perkins v.

1 Benguet Consol. Mining Co., 342 U.S. 437, 446 (1952)). “The standard for establishing general
 2 jurisdiction is ‘fairly high’ and requires that the defendant’s contacts be of the sort that
 3 approximate physical presence.” Bancroft & Masters, Inc. v. Augusta Nat’l Inc., 223 F.3d 1082,
 4 1086 (9th Cir. 2000) (internal citation omitted) (quoting Brand v. Menlove Dodge, 796 F.2d
 5 1070, 1073 (9th Cir. 1986)). Single or isolated activities in the forum state are not enough to
 6 subject a defendant to suit on causes of action unconnected with the activities therein. See Int’l
 7 Shoe Co., 326 U.S. at 317.

8 To establish the “minimum contacts” necessary to support general jurisdiction, Plaintiffs
 9 must establish that Lennox International has substantial “continuous and systematic” contacts
 10 with California tantamount to doing business within the state. Helicopteros Nacionales de
 11 Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984). Plaintiffs cannot meet this burden because
 12 Lennox International did not engage in activities of the sort or scope that constitute “continuous
 13 and systematic” contacts with the State of California, or that “approximate physical presence.”

14 Lennox International is incorporated in Delaware, with its principal place of business in
 15 Texas. (Fernandez Decl. ¶ 3.) Lennox International does not conduct any business, have any
 16 offices, or have any employees in California. (*Id.*) Lennox International does not ship any
 17 merchandise to California, have any contracts with suppliers or vendors in California, or do any
 18 advertising in California. (*Id.*) In short, Lennox International does not engage in any activities
 19 that impact California, and by no means can be said to have a physical presence in California.
 20 Accordingly, Plaintiffs cannot carry their burden of establishing general jurisdiction.

21 **B. Plaintiffs Cannot Establish That The Court Has Specific Jurisdiction Over Lennox**
 22 **International**

23 The Due Process Clause requires that individuals have “fair warning that a particular
 24 activity may subject [them] to the jurisdiction of a foreign sovereign.” Burger King Corp., 471
 25 U.S. at 472. This “gives a degree of predictability to the legal system that allows potential
 26 defendants to structure their primary conduct with some minimum assurance as to where that
 27 conduct will and will not render them liable to suit.” *Id.* Where a forum seeks to assert specific
 28 jurisdiction over an out-of-state defendant who has not consented to suit there, the “fair warning”

1 requirement is satisfied if the defendants have purposefully availed themselves of the privilege of
 2 conducting activities in California, thereby invoking the benefits and protections of its laws; (ii)
 3 the plaintiffs' claims arise out of or relate to the defendants' activities in California; and, (iii) the
 4 exercise of jurisdiction is fair and reasonable. Gray & Co. v. Firstenberg Mach. Co., 913 F.2d
 5 758, 760 (9th Cir. 1990). Plaintiffs cannot meet this burden here.

6 **1. *Lennox International Did Not Purposefully Avail Itself Of The Privilege Of***
 7 ***Conducting Activities In California***

8 The "purposeful availment" requirement assures that a nonresident will be aware that it is
 9 subject to suit in the forum state. It can then protect against the costs of litigating there by
 10 purchasing insurance; or, if the costs and risks are too great, by severing its connections with the
 11 forum state. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Stated
 12 differently, it protects against a nonresident being haled into local courts solely as the result of
 13 "random, fortuitous or attenuated" contacts over which it had no control. Burger King Corp., 471
 14 U.S. at 475. Foreseeability of causing injury in the forum state is not enough by itself to subject a
 15 nonresident to jurisdiction there. World-Wide Volkswagen Corp., 444 U.S. at 295. Rather, "the
 16 foreseeability that is critical to due process analysis...is that the defendant's conduct and
 17 connection with the forum State are such that he should reasonably anticipate being haled into
 18 court there." Id. at 297.

19 As noted above, Lennox International is organized under Delaware law and has its
 20 principal place of business in Texas. (Fernandez Decl. ¶ 3.) Lennox International is not and has
 21 never been qualified to do business in the State of California, and does not conduct business in
 22 California. (*Id.*) Lennox International has no employees and no offices in California. (*Id.*)
 23 Thus, Lennox International has never purposefully availed itself of the privilege of conducting
 24 activities in California, and could not reasonably anticipate being haled into court here.

25 **2. *Lennox International Has No Forum-Related Activities, And Thus Has No***
 26 ***Forum-Related Activities Which Were Relevant To Plaintiffs' Alleged Injuries***

27 The second requirement to exercise specific personal jurisdiction is that the cause of
 28 action at issue arose out of, or was related to, Lennox International's activities in California.

1 Gray & Co., 913 F.2d at 760. As described above, Plaintiffs' claims all relate to fireplaces
 2 manufactured by entities other than Lennox International. Lennox International has never had
 3 any involvement with the design, engineering, testing, assembling, manufacturing, distributing,
 4 supplying, marketing, advertising, selling, maintaining, or placing on the market of the fireplaces
 5 at issue. (Fernandez Decl. ¶ 11.) Accordingly, Lennox International neither undertook nor
 6 performed any "activities" in California that were related to the alleged injuries.

7 **3. *It Is Unreasonable For A California Court To Exercise Jurisdiction Over***
 8 ***Lennox International***

9 If minimum contacts are found to exist, a court's exercise of jurisdiction may still be
 10 improper if such exercise is found to be unreasonable. Asahi Metal Indus. Co, Ltd.. v. Super. Ct.
 11 of Cal., Solano County., 480 U.S. 102, 115 (1987); Burger King, 471 U.S. at 477-78; Amoco
 12 Egypt Oil Co., 1 F.3d at 851. In determining reasonableness, courts examine several factors,
 13 including: (1) the extent of the nonresident defendant's purposeful interjection into the forum; (2)
 14 the burden on the defendant of entering the forum; (3) the extent of the conflict with the
 15 sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5)
 16 the most efficient judicial resolution of the controversy; (6) the importance of the forum to the
 17 plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.
 18 Core-Vent Corp., 11 F.3d at 1487-88. Courts view these factors as a sliding scale: the weaker a
 19 plaintiff's proof on the other requirements (purposeful availment and defendant's forum-related
 20 activities), the less a defendant needs to show in terms of unreasonableness to defeat jurisdiction.
 21 See Burger King Corp., 471 U.S. at 477.

22 Here, as discussed above, Lennox International has had no contacts with California.
 23 Lennox did not purposefully avail itself of any activities in California. Rather, Lennox
 24 International is simply a holding company. Therefore, on the sliding scale, Lennox International
 25 does not need to demonstrate a high level of unreasonableness because Plaintiffs cannot meet
 26 their burden of showing that this Court has personal jurisdiction over Lennox International.

27 Regardless, examining the pertinent factors shows that, without a doubt, the exercise of
 28 personal jurisdiction over Lennox International in California would be unreasonable. Lennox

International has absolutely no contacts with California, has not purposefully interjected itself into California, and would be burdened by defending a national class action lawsuit in a state where it maintains no offices or employees. Additionally, on the issue of sovereignty, the States of Texas and Delaware have an interest in overseeing the activities of their corporations, including Lennox International. And finally, alternative forums exist, such as Texas or Delaware, where Lennox International may be subject to personal jurisdiction. For these reasons, the Court has no basis to exercise specific jurisdiction over Lennox International.

C. The Contacts Of Lennox Hearth And Superior Fireplace Company Cannot Be Imputed To Lennox International

As noted earlier, Plaintiffs allege in their Complaint that each of the Defendants were at all times “the agents, servants, controlling and actively participating parents, subsidiaries, affiliates, relations, or employees” of each other. (Compl. ¶ 12.) Plaintiffs likewise allege that in engaging in the conduct alleged in the Complaint, “each Defendant acted as the agent for each of the other Defendants, or those defendants’ predecessor in interest.” (*Id.* ¶ 13.) Lennox International anticipates that based on these allegations, Plaintiffs may attempt to argue that Lennox Hearth’s and/or Superior Fireplace Company’s contacts with California should be imputed to Lennox International for purposes of establishing personal jurisdiction. This argument is entirely misplaced and devoid of any merit whatsoever.

“The existence of a relationship between a parent company and its subsidiaries is not sufficient to establish personal jurisdiction over the parent on the basis of the subsidiaries’ minimum contacts with the forum.” *Doe*, 248 F.3d at 925 (citing *Tansure, Inc. v. Marsh and McLennan, Inc.*, 766 F.2d 1297, 1299 (9th Cir. 1985)); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781, fn. 13 (1984); *Holland America Line Inc. v. Wartsila North America, Inc.*, 485 F.3d 450, 459 (9th Cir. 2007) (“where a parent and a subsidiary are separate and distinct corporate entities, the presence of one ... in a forum state may not be attributed to the other”). “[A] parent corporation may be directly involved in the activities of its subsidiaries without incurring liability so long as that involvement is ‘consistent with the parent’s investor status.’” *Doe*, 248 F.3d at 926 (quoting *United States v. Bestfoods*, 524 U.S. 51, 69, 118 S. Ct. 1876

(1998)). “Appropriate parental involvement includes: monitoring of the subsidiary’s performance, supervision of the subsidiary’s finance and capital budget decisions, and articulation of general policies and procedures.” *Id.* (internal quotation omitted).

Thus, the minimum contacts of a subsidiary will only be imputed to its parent corporation “if the parent and subsidiary are not really separate entities, or one acts as an agent of the other.” *Doe*, 248 F.3d at 926 (quoting *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996)). Both an alter ego and agency relationship is “typified by parental control of the subsidiary’s internal affairs or daily operations.” *Id.*

Here, Lennox International has never had control over the internal affairs or daily operations of either Lennox Hearth or the former Superior Fireplace Company. As a result, these entities are clearly separate entities from Lennox International.

1. Plaintiffs Do Not Allege And Cannot Prove That Lennox International Is The Alter Ego Of Lennox Hearth Or Superior Fireplace Company

To satisfy the alter ego exception to the general rule that a subsidiary and the parent are separate entities, Plaintiffs must make out a prima facie case “(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice.” *Doe*, 248 F.3d at 926 (quoting *American Telephone & Telegraph Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir. 1996) (citations omitted)); *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 742 (citing *Institute of Veterinary Pathology v. California Health Laboratories* (1981) 116 Cal.App.3d 111, 119-120). The first prong of this test has alternately been stated as requiring a showing that the parent controls the subsidiary “to such a degree as to render the latter the mere instrumentality of the former.” *Doe*, 248 F.3d at 926 (quoting *Calvert v. Huckins*, 875 F.Supp. 674, 678 (E.D.Cal.1995)). Plaintiffs cannot make either showing here.

Plaintiffs do not allege and cannot show that Lennox International “is involved in the day-to-day operations” of either Lennox Hearth or Superior Fireplace Company. *Doe*, 248 F.3d at 927. In fact, just the opposite is true. As discussed above, Lennox Hearth makes its own decisions with respect to how it conducts its business and how it operates, as did Superior

1 Fireplace Company prior to the merger. (Fernandez Decl. ¶¶ 5 and 9.) Lennox International does
 2 not direct, instruct, or in anyway control any operations of Lennox Hearth, and did not direct
 3 instruct or in any way control any operations of Superior Fireplace Company. (*Id.*) Lennox
 4 International does not conduct business on behalf of either Lennox Hearth or Superior Fireplace
 5 Company, nor does it cause Lennox Hearth or Superior Fireplace Company to conduct any
 6 business on behalf of Lennox International. (*Id.*)

7 Likewise, Plaintiffs cannot show that Lennox International, Lennox Hearth, and Superior
 8 Fireplace Company (before the merger) have failed to observe corporate formalities. See Doe,
 9 248 F.3d at 928. Again, the contrary is true. (See Fernandez Decl. ¶¶ 6 and 10.) Plaintiffs do not
 10 allege otherwise in their Complaint.

11 Finally, Plaintiffs have not alleged and cannot allege that disregarding the separateness of
 12 Lennox International and either Lennox Hearth or Superior Fireplace Company prior to the
 13 merger is needed to avoid fraud or injustice. Accordingly, Plaintiffs cannot demonstrate that
 14 there is such a unity of interest and ownership between Lennox International and either Lennox
 15 Hearth or Superior Fireplace Company prior to the merger that the separate personalities of the
 16 two entities no longer exist. Plaintiffs therefore cannot rely on alter ego as a basis for asserting
 17 personal jurisdiction over Lennox International.

18 **2. *Neither Lennox Hearth Nor Superior Fireplace Company Is An “Agent” Of***
 19 ***Lennox International***

20 In order to establish that either Lennox Hearth or Superior Fireplace Company is an agent
 21 of Lennox International for purposes of personal jurisdiction, Plaintiffs must show that Lennox
 22 Hearth and/or Superior Fireplace Company functions as Lennox International’s representative in
 23 that it performs services that are “sufficiently important to the foreign corporation that if it did not
 24 have a representative to perform them, the corporation’s own officials would undertake to
 25 perform substantially similar services.” Doe, 248 F.3d at 928 (quoting Chan v. Society
 26 Expeditions, Inc., 39 F.3d 1398, 1405 (9th Cir.1994)). “[I]f a subsidiary performs functions that
 27 the parent would otherwise have to perform, the subsidiary then functions as ‘merely the
 28 incorporated department of its parent.’” Id. (quoting Gallagher v. Mazda Motor of America, Inc.,

1 781 F.Supp. 1079, 1083-84 (E.D. Pa. 1992)).

2 “At an irreducible minimum, the general agency test requires that the agent perform some
3 service or engage in some meaningful activity in the forum state on behalf of its principal such
4 that its ‘presence substitutes for presence of the principal.’” Doe, 248 F.3d at 928 (quoting
5 Gallagher, 781 F.Supp. at 1084). The outcome of this test is simple where, as here, the parent
6 corporation is simply a holding company. In such a situation, the holding company “could simply
7 hold another type of subsidiary” to continue its business, and thus “imputing the subsidiaries’
8 jurisdictional contacts to the parent would be improper.” Doe, 248 F.3d at 929 (citing Gallagher,
9 781 F.Supp. at 1085). “Where a holding company is nothing more than an investment
10 mechanism, i.e., a device for diversifying risk through corporate acquisitions, the subsidiaries
11 conduct business not as its agents but as its investments.” Id. (quoting Bellomo v. Pennsylvania
12 Life Co., 488 F.Supp. 744, 746 (S.D.N.Y. 1980)).

13 Applying this rationale, the Ninth Circuit in Doe found no agency relationship under facts
14 similar to those at issue here. “[T]he fact that [the parent corporation] indirectly owns or holds
15 the stock of [its two subsidiaries] does not, without more, convert these two corporations into
16 general agents for [the parent corporation] for jurisdictional purposes under the Ninth Circuit’s
17 agency test.” Doe, 248 F.3d at 930 (refusing to impute contacts of either operational subsidiaries
18 or subsidiary holding companies to parent corporation for jurisdictional purposes, and finding that
19 court lacked personal jurisdiction over the parent).

20 As in Doe, Lennox International acts merely as a holding company. (Fernandez Decl. ¶
21 3.) Plaintiffs cannot show that in the absence of Lennox Hearth, or Superior Fireplace Company
22 before the merger, Lennox International would design, engineer, test, assemble, manufacture,
23 distribute, supply, market, advertise, sell, maintain, or place on the market any of Lennox
24 Hearth’s or Superior Fireplace Company’s products. See Doe, 248 F.3d 929. Nor, does Lennox
25 International directly control the day-to-day activities of either Lennox Hearth or Superior
26 Fireplace Company. (Fernandez Decl. ¶¶ 5 and 9.) Thus, under Doe, Plaintiffs cannot
27 demonstrate that either Lennox Hearth or Superior Fireplace Company is an agent of Lennox
28 International for jurisdictional purposes. See Doe, 248 F.3d 928-930.

V. CONCLUSION

For the foregoing reasons, Defendant Lennox International respectfully requests that the Court grant this motion and dismiss Lennox International from this matter for lack of personal jurisdiction.

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